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IN THE

Supreme Court of the United States

October Term, 1951

No.

THEODORE D. LEWIS, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

To the Honorable, The Chief Justice and The Associate Justices of the Supreme Court of the United States:

The petitioner, appellant below, prays that a writ of *certiorari* issue to review the judgment entered by the United States Court of Appeals for the District of Columbia Circuit, in the above-entitled cause, Appeals No. 10,742, on May 10, 1951, (R. 16).

OPINIONS BELOW.

The United States District Court for the District of Columbia did not render an opinion in this cause. The appeals opinion therein is set forth on pages 13-15 of the Record.

JURISDICTION.

The judgment of the United States Court of Appeals for the District of Columbia Circuit here in question was entered on May 10, 1951, (R. 16) and a petition for rehearing was denied July 12, 1951 (R. 17). The jurisdiction of this Court is invoked under Title 28 U.S.C., Sec. 1254-(1); June 25, 1948, C. 646, 62 Stat. 928.

QUESTION PRESENTED.

Whether a claim by a beneficiary of the Policemen and Firemen's Relief Fund, District of Columbia, (hereinafter referred to as the Fund) is a "claim or remedy" against said District or against the United States.

STATUTES INVOLVED.

The pertinent parts of the statutes involved are hereinafter discussed in the argument, and are also set out in the Appendix hereto.

STATEMENT OF FACTS.

The petitioner, at the time of his subject injury, was a member of the United States Park Police force. The respondent is the United States. On or about September 18, 1946, another employee of the respondent, also a Park policeman, negligently and recklessly shot the petitioner five times, grievously wounding him. Members of the United States Park Police are by statute entitled to all the benefits of the Fund; and have been held, as of May 18, 1951, not entitled to any benefit provided by the Federal Employees' Compensation Act. (App. 11).

Petitioner, having received his rightful benefits from the Fund, sought damages under the Federal Tort Claims Act; but his complaint was dismissed by the United States District Court for the District of Columbia (R. 4); the Order of dismissal being affirmed by the Court of Appeals *on*

grounds not considered by the District Court. The petitioner prays hereby for a review of the Appeals decision on *certiorari.*

SPECIFICATIONS OF ERRORS TO BE URGED.

The Court of Appeals erred (1) in its ruling that the Policemen and Firemen's Relief Fund, District of Columbia (Act of September 1, 1916, 39 Stat. 718, C. 433, 12; Act of May 27, 1924, 43 Stat. 176, C. 199, 7; D. C. Code (1940 Ed. 4-501 et seq.; 4-515) is a *federal* system of "simple, certain, and uniform *compensation* for injuries and death;" (2) in holding that the decision in *Wham* v. *United States,* 180 F. 2d. 38, C.A.D.C. (1950) is not controlling in the instant case; and (3) in holding that the instant case is in any controlling aspect analogous to the case of *Feres* v. *United States,* 340 U.S. 135.

REASONS FOR GRANTING THE WRIT.

The petitioner asserts that a writ of *certiorari* should be granted in this cause, under subdivision five (5) of Rule 38 of this Court, because the Appeals decision hereby sought to be reviewed directly conflicts with one of its own earlier decisions on the same matter (*Wham* v. *United States, supra*) in that it here holds the Fund to be a *federal* system of "simple, certain, and uniform compensation for injuries or death," while in the *Wham* case it expressly held, *au contraire,* upon consideration of the identical statutes here involved, that "neither in form nor substance, name nor character can it (the Fund) be regarded as a fund of the United States."

The petitioner further respectfully bespeaks a timely and final determination of the federal question of local importance, as to whether the Fund as authorized by Congress is a federal system of "simple, certain, and uniform compensation for injuries or death," or merely a local retirement-insurance system, distinct from and in no substantive

sense related to any "system of compensation," federal or otherwise.

It is finally and respectfully submitted that the Court of Appeals has erred in its failure to accord the proper effect to the decision of this Court in *Feres* v. *United States*, 340 U.S. 135, in that said case would have the controlling effect attributed to it *only on an express finding that the Fund is a federal system of compensation*, which finding would be both contrary to the facts and inconsistent with the ruling in the unreversed *Wham* case.

The writ should be granted on all the aforegoing grounds, for the reasons herein stated.

ARGUMENT.

A. The Appeals Decision Hereby Sought to be Reviewed Is In Direct Conflict with the Antecedent Decision of the Same Court in Wham v. United States, supra.

1. The facts in both cases are substantively identical.

Wham was a member of the Metropolitan police of the District of Columbia; the petitioner herein was a member of the United States Park Police. Each was injured through the negligence of a Federal employee. Each had received benefits under the Fund. Neither was entitled to benefits under the Federal Employees' Compensation Act. [The Bureau of Employees' Compensation of the Department of Labor has expressly held that the petitioner herein is NOT entitled to any benefits under the Federal Employees' Compensation Act. (App. 11)]. Wham was allowed to sue; the petitioner was denied the right.

2. The controlling statutes in both cases are identical.

The only statutes involved in this case, as well as in the *Wham* case, are the Federal Tort Claims Act (App. 9) and an Act of Congress authorizing the establishment and operation of the Fund, (App. 9-10).

3. The respective decisions of the court below are irreconcilably inconsistent.

The District Court in the *Wham* case, having concluded that the United States had provided through the Fund a comprehensive system of compensation for the members of the class to which Wham belonged, denied to him, as a member of that class, the right to maintain an action for damages under the Tort Claims Act; citing *Dobson* v. *United States*, 2 Cir., 27 F. 2d. 807, *certiorari* denied 278 U.S. 653; *Bradey* v. *United States*, 2 Cir., 151 F. 2d. 742; and *Dahn* v. *Davis*, 258 U.S. 421.

The Court of Appeals flatly rejected the latter reasoning, and reversed the decision in the *Wham* case, on the stated ground that:

> We think it is not accurate to speak of the Federal Government as supporting the Police and Firemen's Fund, * * *. *Neither in form nor substance, name nor character, can it be regarded as a fund of the United States.* Of course, Congress, in its capacity as the lawmaking body for the District of Columbia, authorized the plan whereby the Fund has been established and conducted under local auspices. However, *that does not justify the argument that the United States created the fund.* It has been *created* and *supported* by the *monies* flowing into it from the *many sources* authorized by the Statute, *including the small proportions indirectly reaching it from federal revenues.* (Petitioner's italics.)

The Court of Appeals further characterized the Fund as non-Federal, by its denial of the contention that Wham had been required to elect his remedy, as between benefits under the Fund and a suit under the Tort Claims Act, on the stated grounds that:

> The doctrine of election applies only where inconsistent remedies are pursued to enforce the same cause. * * * But where there are two or more concurrent and consistent remedies, one or all may be prosecuted until

> full satisfaction is obtained. Here appellant's injuries gave rise to separate and distinct claims, *one* as a policeman *against the District of Columbia* for benefits afforded by the Fund, *another* as an individual *against the United States* for damages accorded by the Tort Claims Act. Obviously, *these are not inconsistent remedies to enforce a single right, but concurrent or cumulative remedies against different defendants* in pursuit of *separate and distinct causes of action.* (Petitioner's italics.)

Au contraire, in the instant case, the Court of Appeals has held that the Fund is a system of "simple, certain and uniform compensation," provided by Congress for beneficiaries of that Fund, and that to allow the petitioner herein to maintain his action under the Tort Claims Act would be to afford him either a *double recovery* or an *election* of remedies *against the United States.* That this was the *ratio decidendi* of the instant case is clearly apparent from the statement on pages 2 and 3 of the opinion below, that:

> Like the soldier in the *Feres* case, the Park policeman obtains the benefit of "systems of simple, certain, and uniform compensation for injuries or death." Members of the Park Police are by congressional enactment entitled to "all the benefits of relief and retirement" furnished by the "Policemen and Firemen's Relief Fund, District of Columbia." That "statutory scheme contemplates a broad system of relief by way of medical and hospital care and treatments, pensions, and retirement." As was said in the *Feres* case, "If Congress had contemplated that this Tort Act would be held to apply to cases of this kind, it is difficult to see why it should have omitted any provision to adjust *these two types of remedy* to each other." (Petitioner's italics.)

Thus, the Court of Appeals in the instant case has adopted the reasoning of the District Court which it flatly rejected in its consideration of the *Wham* case.

The Court of Appeals had sought to distinguish the instant case from the *Wham* case, on the ground that Wham was employed by the District of Columbia, while the petitioner herein was a Federal employee. But the decision in the *Wham* case was grounded, NOT upon the Federal or non-Federal status of the beneficiaries of the Fund, but upon the characterization and classification of the Fund as having been *created by the District of Columbia* and *supported without recourse to Federal funds,* thereby constituting a claim under the Fund a remedy against the District of Columbia, and not against the United States.

Thus, in both cases, while the Court below had consistently adhered to the broad general principle enunciated earlier by this Court in *Dahn* v. *Davis, supra,* and recently in *Feres* v. *United States, supra,* that those members of a class for whom Congress has provided a system of simple, certain, and uniform compensation for injuries or death may not sue the United States under the Tort Claims Act, it had held in applying that principle in the *Wham* case that the Fund, as availed of therein, is NOT a Federal Government system, and now by a direct contraversion in the instant case that the identical Fund, as identically availed of by the petitioner herein, IS a Federal Government system.

The aforegoing irreconcilable conflict of decisions, therefore, poses the question now requiring decision by this Court, as to whether a claim by a beneficiary of the Fund is a "claim or remedy" against the District of Columbia or against the United States. The question so presented is a Federal question of vast local and public importance, which has not been but should be correctly and finally settled by this Court.

CONCLUSION.

Wherefore, the petitioner prays that a writ of *certiorari* may issue in this cause, under the Seal of this Court, directed to the United States Court of Appeals for the District of Columbia Circuit; that, upon review, the judgment of said Court be vacated, reversed, and set aside; and that this cause be remanded to said Court with instructions to proceed further in accordance with the views to have been propounded by this Court.

Respectfully submitted,

OTIS BEALL KENT,
Attorney for Petitioner.

DARK PAGE BLEED THRU

APPENDIX.

Statutes Involved in Argument.

1. The Federal Tort Claims Act, being in part as follows:

(a) *Jurisdiction of District Courts*—Sec. 1346(b):

* * * the district courts, * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after Jan. 1, 1945, for * * * personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his * * * employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. 28 U.S.C.A. Sec. 1346(b), June 25, 1948, C. 646, 62 Stat. 933; Amended April 25, 1949, C. 92, Par. 2(a), 63 Stat. 62; May 24, 1949, C. 139, par. 80(a)(b), 63 Stat. 101.

(b) *Liability of United States*—Sec. 2674: The United States shall be liable respecting the provisions of this Title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages. 28 U.S.C.A. Sec. 2674, June 25, 1948, C. 646, 62 Stat. 983.

2. Title 4, Chapter 5, D. C. Code (1940):

§4-501 *Creation.*

The funds authorized by law prior to September 1, 1916, and known as the police relief fund and the firemen's relief fund shall be designated and known as the policemen and firemen's relief fund, District of Columbia. (Sept. 1, 1916, 39 Stat. 718, ch. 433, §12.)

§4-503 *Composition—Deficiencies supplied from revenues of District of Columbia—Pensions payable from Accounting.*

The said fund shall consist of all fines imposed by the commissioners of the District of Columbia upon members of the police and fire departments of said District by way of discipline; all rewards, proceeds of gifts, and

emoluments that may be received by any member of said departments (for extra-ordinary services), except such part thereof as the said commissioners may allow to be retained by members of said departments; a deduction of three and one-half per centum of the monthly salary of each member of said departments; donations; and the net proceeds of sales of unclaimed property in the custody of the property clerk of the police department; all of which shall be paid into the treasury of the United States to the credit of the "Policemen and firemen's relief fund, District of Columbia," herein provided for; and should the said fund at any time be insufficient to defray the expenditures hereinafter provided for, the commissioners of the District of Columbia, in that event, are authorized and it shall be their duty, to direct the collector of taxes of said District, and it shall be the duty of the said collector, pursuant to such direction, to pay into the treasury of the United States, out of the general revenue of the District of Columbia collected by him, to the credit of the said "Policemen and firemen's relief fund, District of Columbia," such sums as may be necessary from time to time to meet deficiencies in said fund. The moneys to the credit of the said fund shall be available for appropriation by Congress annually only for expenditure on requisitions of the said commissioners for the purposes set forth in sections 4-501, 4-503, 4-506 to 4-510, 4-512 to 4-514 inclusive, of this title, and all expenditures from said fund shall be made and accounted for in the same manner as other expenditures of the government of the District of Columbia are made and accounted for. (Sept. 1, 1916, 39 Stat. 718, ch. 433, §12; May 27, 1924, 43 Stat. 176, ch. 199, §7; June 7, 1924, 43 Stat. 560, ch. 302; July 1, 1930, 46 Stat. 840, ch. 783, §5.)

§4-515 *Retirement provisions made applicable to park police force—Rate of payment.*

Under and in accordance with sections 4-501, 4-503, 4-506 to 4-510, 4-512 to 4-514, members of the United States park police force shall be entitled to all the benefits of relief and retirement therein authorized.

COPY

U. S. DEPARTMENT OF LABOR
BUREAU OF EMPLOYEES COMPENSATION
WASHINGTON, D. C.

May 18, 1951

File No. X-586570

Mr. Theodore D. Lewis
1829 Bay Street, S. E.
Washington, D. C.

Dear Mr. Lewis:

Reference is made to the injury alleged to have been sustained by you on September 18, 1946, while employed as Detective by the National Park Service, Department of the Interior, Washington, D. C.

On the basis of the evidence on file in your case it does not appear that you are entitled to benefits under the Federal Employees' Compensation Act because you were not a Civil Officer or Employee of the United States at time of injury within the meaning of the Act.

This notice is not a decision on your case but is intended to give you an opportunity to present any further evidence you may care to offer before a decision is made.

No further action will be taken by the Bureau concerning your right to benefits unless, in response to this letter, you advise whether you intend to perfect your claim.

Very truly yours,

S. D. Logsdon,
Chief of Section.

Byron N. Scott,
Attorney at Law
1025 Vermont Ave., N. W.,
Washington, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 313

THEODORE D. LEWIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the United States District Court for the District of Columbia (R. 4-5) is not reported. The opinion of the Court of Appeals for the District of Columbia Circuit (R. 13-15) is reported at 190 F. 2d 22.

JURISDICTION

The judgment of the Court of Appeals was entered on May 10, 1951 (R. 16). A petition for re-

hearing was denied on July 12, 1951 (R. 17). The petition for a writ of certiorari was filed on September 11, 1951. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

The "Policemen's and Firemen's Relief Fund" was originally established by Congress to provide policemen and firemen of the District of Columbia, who are injured or die in line of duty, with a broad system of relief by way of medical and hospital care and treatment, workmen's compensation and retirement and pension privileges. Congress later extended the Fund's comprehensive benefits to United States Park Policemen employed by the Department of the Interior.

The question presented is whether a United States Park Policeman, who becomes entitled to these benefits because of injuries sustained by him in line of duty when accidently shot by a fellow policeman, may also recover damages against the United States under the Federal Tort Claims Act on the theory that the benefits of the Fund are not "federal" but "local" in nature.

STATUTES INVOLVED

1. 28 U. S. C. 1346(b), formerly part of the Federal Tort Claims Act, is set forth in the Appendix, *infra*, p. 10.

2. The pertinent provisions of the Act of September 1, 1916 (39 Stat. 676, 718), which created the

"Policemen's and Firemen's Relief Fund" for District of Columbia policemen and firemen, are set forth in the Appendix, infra, pp. 10-12.

3. The pertinent provisions of the Act of May 27, 1924 (43 Stat. 174, 176), which extended the benefits of the 1916 Act to United States Park Policemen, are set forth in the Appendix, *infra*, p. 12.

STATEMENT

This is an action for damages under the Federal Tort Claims Act for personal injuries sustained by a United States Park Policeman in the course of his employment (R. 2).

On September 18, 1946, at about 11:00 P. M., "while engaged in the regular pursuit of his employment," petitioner arrested two men (R. 2). The two prisoners broke away and petitioner pursued them (R. 3). A fellow Park Policeman, also in the employ of the Department of the Interior, joined in the pursuit and shot petitioner under the mistaken impression that he was one of the fugitives (R. 3, 6). Petitioner sustained serious and disabling injuries (R. 3).

For those injuries he applied for and has been receiving "his rightful benefits" from the Policemen's and Firemen's Relief Fund (Pet. 2).[1] On

[1] See copy of the ruling of the Comptroller General (Appendix, *infra*, pp. 12-14) showing that petitioner was retired under the 1916 Act as of June 1, 1947 and has been receiving from the Fund disability retirement pay amounting to one-half of his annual salary of $3994. Information obtained from the District of Columbia Auditor's Office shows that petitioner has already received more than $6,000 in retirement pay from

February 24, 1950, long after his eligibility for these benefits had been confirmed and almost 3½ years after the accident, petitioner instituted the instant action under the Federal Tort Claims Act (R. 2-4). The complaint alleged that he was recklessly and negligently shot by the other Park Policeman (R. 3).

The United States filed a motion to dismiss for failure to state a cause of action (R. 4). This motion was granted by the district court (R. 5). On appeal, the court below pointed out that petitioner was entitled to the benefits of the broad system of relief provided by the Fund in the form of medical and hospital care and treatment, pensions and retirement (R. 15). And, applying this Court's decision in *Feres* v. *United States,* 340 U. S. 135, the availability of this comprehensive scheme of benefits for injuries incurred in line of duty was held to preclude additional relief under the Federal Tort Claims Act (R. 14-15). The judgment of the district court, dismissing the complaint, was accordingly affirmed (R. 16).

ARGUMENT

Petitioner does not challenge the principle that a federal employee's eligibility for workmen's compensation, paid leave, medical and disability pension benefits by necessary implication precludes

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the Fund and that he is now receiving monthly payments of $181.26 from the Fund. These payments are in addition to the medical, surgical and hospital expenses paid for him by the Fund.

his recovery of additional damages under the Federal Tort Claims Act or any other appropriate jurisdictional act for injuries sustained in the performance of his duty. Petitioner fully recognizes that this "broad general principle * * * [has been] * * * consistently adhered" to since *Dahn* v. *Davis*, 258 U. S. 421, and has been recently reaffirmed by this Court in *Feres* v. *United States*, 340 U. S. 135 (Pet. 7). Congress, too, has explicitly reaffirmed this basic principle with respect to the great body of federal civilian employees covered by the Federal Employees Compensation Act, which now contains in express terms the former implied prohibition against suing the United States under any applicable jurisdictional statute for service-incurred injuries and limits them to their compensation, paid leave, retirement and disability pension benefits and other administrative remedies. 5 U. S. C., Supp. IV, 757(b), 63 Stat. 861.[2] But even without the addition of such an express prohibition, it is settled that the same limi-

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[2] Whether the Federal Employees Compensation Act covers the Park Police is a question which, as pointed out by the court below, need not be reached "in disposing of this case" (R. 14). In this connection, it must be noted that the letter from the Bureau of Employees' Compensation, reprinted in the Petition at page 11, expressly stated that it was "not a decision" but a notice intended to afford petitioner "an opportunity to present * * * further evidence * * * before a decision is made" as to his eligibility for Compensation Act benefits. In any event, if petitioner is ineligible for those benefits it is apparent that such ineligibility would be due to his eligibility for the equally comprehensive benefits made available to him by Congress through the Policemen's and Firemen's Relief Fund.

tation is implicit and applies to all federal employees, military as well as civilian. *Feres* v. *United States, supra; Mandel* v. *United States,* 191 F. 2d 164 (C. A. 3); *Johansen* v. *United States,* 191 F. 2d 162 (C. A. 2); *Posey* v. *Tennessee Valley Authority,* 93 F. 2d 726 (C. A. 5). *Contra: Johnson* v. *United States,* 186 F. 2d 120 (C. A. 4).

While recognizing the force of the principle limiting employees to their compensation, paid leave and other administrative remedies, petitioner attempts to avoid its impact by arguing that the principle applies only where the administrative benefits are "federal" in nature and that here the administrative benefits of the Fund are not "federal" but "local." Even if we accept petitioner's assumption that the benefits must be "federal", the short answer to his contention is that the benefits of the Fund, when applied to petitioner, who is a "federal" not a "local" employee, are, as the court below viewed them, "federal" in nature (R. 14-15; Pet. 6). In addition, the question as to the nature of the benefits of the Fund, the operation of which is limited to employment within the District of Columbia,[3] has already been decided by the Court

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[3] The fund was created originally for policemen and firemen of the District of Columbia. Even as applied to the United States Park Police, the benefits do not go beyond the District of Columbia inasmuch as the Park Police have "the same powers and duties as the Metropolitan police of the District" and are provided by the United States Government for service only "in the District of Columbia." District of Columbia Code (1940 ed.), Sec. 4-201. Increases in the salaries of Park Policemen have been authorized by Congress so as to "conform

of Appeals for the District of Columbia Circuit and does not, we submit, warrant review here.

1. While the Fund was originally created for the benefit of the policemen and firemen of the District of Columbia, it is significant that it was the Congress of the United States that established this Fund for their benefit. In any event, no matter what view is taken of the Fund with respect to Metropolitan Police, there can be no doubt that Congressional extension of its benefits in 1924 to federal employees in the Park Police was necessarily based on the assumption that the Fund was a federal one at least as far as those employees were concerned. Recognition of this distinction in the Fund's availability to District of Columbia employees, on the one hand, and federal employees, on the other, demonstrates the error in petitioner's insistence that the decision below conflicts with the same court's earlier opinion in *Wham* v. *United States,* 180 F. 2d 38. The *Wham* case, as observed by the court below in the instant case (R. 15), involved a Metropolitan policeman—"a person not employed by the Federal Government." It is on that basis that the court below properly distinguished the *Wham* case.[4]

That the fund is a federal one is made even more

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with the increased cost of living in the District of Columbia." Act of July 14, 1945, 59 Stat. 470.

[4] If that distinction should be viewed as insufficient to reconcile the *Wham* case with the present one, it is apparent that the *Wham* case must be regarded as having been overruled in principle by the instant case.

apparent by the fact that the Comptroller General of the United States authorizes payments from the Fund and directs the District commissioners in their administration of the Fund. See *e.g.*, 28 Comp. Gen. 498; 29 Comp. Gen. 20. Indeed, the Comptroller General has made an express ruling as to the specific amount due petitioner under the Fund.[5] We submit that the direct control exercised by the Comptroller General in this case compels the conclusion that payments from the Fund are actually federal expenditures.

2. Despite the fact that the Fund is a federal one, its operation is, as noted above, limited to the District of Columbia. The only question raised by the petition involves not a construction of the Federal Tort Claims Act—which of course is nationwide in its application—but an interpretation of the 1916 statute which created the Fund for District policemen and firemen and for Park Police serving in the District of Columbia. Absent an unusual showing of importance, this Court normally declines to review interpretations by the Court of Appeals for the District of Columbia Circuit of statutes limited in their operation to the District of Columbia. See *District of Columbia* v. *Pace*, 320 U. S. 698, 702; *Del Vecchio* v. *Bowers*, 296 U. S. 280, 285; *American Security Co.* v. *District of Columbia*, 224 U. S. 491, 494; Robertson & Kirkham, *Jurisdiction of the Supreme Court*

[5] A copy of this ruling is set forth in the Appendix, *infra*, pp. 12-14.

of the United States (1951 ed. by Wolfson & Kurland), Sections 157, 360. Since the 1916 statute is so limited, we submit that the decision below does not warrant review here.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.
HOLMES BALDRIDGE,
Assistant Attorney General.
PAUL A. SWEENEY,
MORTON HOLLANDER,
Attorneys.

OCTOBER 1951.

APPENDIX

1. 28 U. S. C. 1346(b), formerly part of the Federal Tort Claims Act, provides:

> Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

2. The Act of September 1, 1916 (39 Stat. 676, 718) provides in pertinent part:

> SEC. 12. That from and after the passage of this Act the funds now authorized by law and known as the "Police relief fund" and the "Firemen's relief fund" shall be designated and known as the "Policemen and firemen's relief fund, District of Columbia."
>
> The said fund shall consist of all fines imposed by the Commissioners of the District of Columbia upon members of the police and fire departments of said District by way of discipline; all rewards, proceeds of gifts, and

emoluments that may be received by any member of said departments (for extraordinary services), except such part thereof as the said commissioners may allow to be retained by members of said departments; a deduction of one and one-half per centum of the monthly salary of each member of said departments; donations; and the net proceeds of sales of unclaimed property in the custody of the property clerk of the police department; all of which shall be paid into the Treasury of the United States to the credit of the "Policemen and firemen's relief fund, District of Columbia," herein provided for; and should the said fund at any time be insufficient to defray the expenditures hereinafter provided for, the Commissioners of the District of Columbia, in that event, are authorized, and it shall be their duty, to direct the collector of taxes of said District, and it shall be the duty of the said collector, pursuant to such direction, to pay into the Treasury of the United States, out of the general revenue of the District of Columbia collected by him, to the credit of the said "Policemen and firemen's relief fund, District of Columbia," such sums as may be necessary from time to time to meet deficiencies in said fund. The moneys to the credit of the said fund shall be available for appropriation by Congress annually only for expenditure on requisitions of the said commissioners for the purposes set forth in this Act, and all expenditures from said fund shall be made and accounted for in the same manner as other expenditures of the government of

the District of Columbia are made and accounted for.

3. The Act of May 27, 1924 (43 Stat. 174, 176) provides in pertinent part:

> SEC. 7. That under and in accordance with section 12 of the Act entitled "An Act making appropriations to provide for the expenses of the government of the District of Columbia for the fiscal year ending June 30, 1917, and for other purposes," approved September 1, 1916, as amended, members of the United States park police force shall be entitled to all the benefits of relief and retirement therein authorized upon the payment by each member into the policemen and firemen's relief fund, District of Columbia, of an amount equal to 1½ per centum of the total basic salary received by him since September 1, 1916, as a member of such United States park police force, and as a watchman of the United States in any public square or reservation in the District of Columbia: * * *

4. Ruling of the Comptroller General:

COMPTROLLER GENERAL OF THE UNITED STATES
Washington 25

B-72760 Feb. 20, 1950

Honorable John Russell Young, President
Board of Commissioners of the
District of Columbia

MY DEAR MR. YOUNG:

Reference is made to your letter of December 23, 1949, requesting decision whether the Commis-

sioners of the District of Columbia are authorized to increase the relief payments to T. D. Lewis, former member of the United States Park Police, who was retired by reason of disability on June 1, 1947, and granted relief under the act of September 1, 1916, 39 Stat. 676, 718, as amended, in the amount of one-half of his salary of $3,668.97 at date of retirement, or $1,834.44 per year.

It is stated by you that, during the period July 1, 1946, to May 31, 1947, the claimant was assigned to special service in the Department and by reason of the provisions of the act of June 19, 1946, 60 Stat. 261, claims that the basic salary paid him should have been increased in accordance therewith from June 19, 1946, to May 31, 1947, to the salary rate of $3,994. As indicated in your letter, the claimant presented a claim to this Office for the difference in his gross salary, and by settlement of May 19, 1949, payment was authorized to be made to him of a net amount of $276.64, which sum included an adjustment in lump-sum leave payment.

The said act of June 19, 1946, provides, in effect, that the special allowances previously authorized to members of the Metropolitan Police force and United States Park Police force should thereafter be considered as increases in the "basic salaries" of such police. Likewise, the increases granted by Public Law 151, 59 Stat. 470, and Public Law 491, 60 Stat. 480, constitute increases in their basic salaries. Accordingly, all such increases should have been taken into consideration in computing the salary to be paid Mr. Lewis thereafter up to the time and upon the date of his retirement, and such gross salary should be used for the computa-

tion of the relief payments to him, under the 1916 statute, *supra,* retroactive from the date of his retirement, that is, June 1, 1947.

Sincerely yours,

(Signed) LINDSAY C. WARREN,
Comptroller General of the United States

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 313.

THEODORE D. LEWIS, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR REHEARING ON A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

OTIS BEALL KENT,
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Counsel:
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PETITION FOR REHEARING ON A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Comes now the petitioner and presents this petition for a rehearing on the petition for a Writ of Certiorari filed in this case.

JURISDICTION.

The petition for certiorari was filed on September 11, 1951 and denied on November 5, 1951. This petition for rehearing is filed within fifteen days from November 5, 1951, in accordance with Rule 33 of this Court.

REASONS FOR PETITION FOR REHEARING.

In applying for this rehearing your petitioner reiterates each and every ground set forth in the original petition, and further suggests to the Court that, pursuant to Rule 33 and following the precedent established by this Court in *Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 305 U. S. 47, 50, other substantial grounds available to the petitioner, although not previously presented, exist for the allowance of the Writ.

1. The Government in its brief in opposition to the granting of the petition for certiorari has asserted that the statute authorizing the Policemen and Firemen's Relief Fund, District of Columbia, is limited in its operation to the District of Columbia. From this it has been contended that because this Court usually refuses to review a decision of the United States Court of Appeals for the District of Columbia Circuit interpreting a statute so limited in its operation, the petition should be denied.

2. The statute in question has not been so limited since the enactment of Public Law 447, 80th Congress, 2nd Session, approved March 17, 1948. This statute extended the jurisdiction of the United States Park Police beyond the confines of the District of Columbia, to the environs of the District, embracing by definition Arlington and Fairfax Counties and the city of Alexandria in Virginia, and Prince Georges, Anne Arundel, and Montgomery Counties in Maryland, thereby placing approximately 30,000 acres of land outside the boundaries of the District of Columbia, and in two different States, under the jurisdiction of the said Park Police.

3. Since United States Park Policemen may be detailed to any locality over which the Park Police exercise jurisdiction it is possible for a case similar to the instant one to be contested in either Maryland or Virginia. If so contested there would undoubtedly be a conflict of decision because of the readily apparent conflict between the de-

cisions in the instant case and the *Wham* case in this Circuit.

4. But inasmuch as the Metropolitan Police, who *are* restricted to the District of Columbia, constitute the overwhelming majority of possible claimants under the Fund, it is improbable that any case involving the questions in the instant case will ever arise in either Virginia or Maryland.

5. It is submitted therefore that the determination of the questions of (1) whether the Relief Fund is a system of compensation within the meaning of that term as used in *Feres* v. *United States,* and (2) whether the Fund, if held to be a compensation system, is a federal system within the principle as expressed in *Feres* v. *United States, Wham* v. *United States,* and the instant case is of sufficient importance to warrant review of the instant decision and final determination of these questions by this Court.

CONCLUSION.

For the foregoing reasons, the petitioner respectfully urges that a rehearing be granted; that upon further consideration that the Order of November 5, 1951 denying the petition for certiorari be revoked, and that said Writ issue.

OTIS BEALL KENT,
Attorney for Petitioner.

I, OTIS BEALL KENT, of Counsel for the petitioner, Theodore D. Lewis, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for the purpose of delay and that such petition for rehearing is confined to substantial grounds not previously presented to the Court.

OTIS BEALL KENT.